

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 25TH JULY 2006 / 3RD SRAVANA 1928

CRL.A.No. 806 of 2001()

CC.431/1997 of JUDL. MAGISTRATE OF FIRST CLASS COURT,
KUNNAMKULAM
.....

APPELLANT:

ANIL DAS, S/O.VELLIDIYAN KUNNATH VEETIL,
RAMANKUTTY, PORKULAM VILLAGE,
THALAPPILLY TALUK.

BY ADV. SRI.D.ANIL KUMAR

RESPONDENTS:

1. K.VAHIDA, D/O. M.V.KAJA HUSSAIN,
HANEENA MANCILIL, PIRAYIRI VILLAGE,
PALAKKAD DISTRICT AND TALUK P.O., PONNANI.
2. STATE OF KERALA REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1-BY ADV. SRI.RAJIT
M.RAJAGOPALAN.

R2-PUBLIC PROSECUTOR SRI.K.J.GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 25/07/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.HEMA, J.

CRL.A.NO.806 OF 2001-C

Dated this the 25th day of July, 2006.

JUDGMENT

This appeal is filed challenging the order of acquittal.

2. The appellant filed a complaint before the Magistrate's Court on the allegation that the accused borrowed a sum of Rs.1,47,000/= on 11.12.1996 and he promised to return the amount in six months, but, he failed to do so and on demand on 11.6.1997, he signed a cheque dated 11.6.1997 and gave to the complainant. On presentation of the cheque it was returned unpaid on the ground that account closed. A notice was issued under Section 138(b) of the N.I.Act demanding payment, but he did not pay the amount and hence a complaint was filed against the 1st respondent.

3. PWs 1 and 2 were examined and Exhibits P1 to P12 were marked on the side of the prosecution. Accused examined DW1 and marked Ext.D1 on her side. On an analysis of the evidence, the trial court found that the accused succeeded in establishing that there was no transaction between the accused and the complainant and that Ext.P1 cheque was issued to

Dhanam Corporation and not to the complainant. It was also held that the accused succeeded in rebutting the presumption and that the prosecution failed to establish that Ext.P1 cheque was issued by the accused to the complainant for discharge of a legally enforceable debt or liability. The court below also held that there was no account maintained by the accused with the Bank and hence it cannot be said that the cheque was drawn on an account maintained by the appellant. On these grounds, it was held that no offence under Section 138 of the N.I.Act was made out and accused was acquitted. Hence this appeal.

4. The learned counsel appearing for appellant argued the fact that an account was maintained by the 1st accused is not under challenge. The evidence of PW2, the Manager and that documentary evidence such as Exts.P1,P2,P9,P10,P11 and P12 would all establish that accused had maintained an account with the Bank. Even though the cheque was returned stating that account is closed, it is well settled now that an offence will lie under Section 138 of the N.I.Act, it is submitted. As per the settled position it is enough that the complainant establishes that the accused "was" maintaining the account and it is not necessary that to prove that accused "is" still maintaining an

account to constitute the offence under Section 138 of the Act and hence finding of the court below that no offence is made out since the account is closed, cannot be sustained, it is argued.

5. Learned counsel for the 1st respondent strongly contended that on the basis of evidence adduced the trial court has already come to a finding that the defence version is probablised. It is argued that there is no reason to interfere with such findings since in an appeal against acquittal the court must be slow to interfere with the finding of facts. If a reasonable view is taken by the trial court, this court will be debarred from interfering with the order of acquittal, as laid by the Supreme Court in the decisions reported in **Shailendra Pratap v. State of U.P** (2003 (1) SCC 761) and **State of West Bengal v. Orilal Jaiswal**, (1994 (1) SCC 73), it is strongly argued.

6. In the light of the submissions made, I have gone through the records in the case. I am satisfied that the order of acquittal on the ground that there is no existing account cannot be sustained, as per law. It is enough if there is evidence to show that accused was maintaining an account

and that fact is proved. Therefore, the order of acquittal on the ground that there was no existent account is not legal. It is also appears from paragraph 7 of the judgment that the trial court has not properly understood the scope of Section 139 of the Act and it has made a perverse approach to the issues involved in this case. The trial court found that accused “succeeded in rebutting the presumption” under Section 139, and “hence prosecution failed to establish that the cheque was issued by the accused to complainant in discharge of a legally enforceable debt or liability”

7. A reading of Section 139 shows that presumption under Section 139 N.I. Act arises only if the prosecution proves that the cheque was drawn by the accused. If there is proof that accused has drawn the cheque, a presumption may arise in favour of the “holder” that he received the cheque of the nature referred to in Section 138 for the purpose of discharge of a debt or liability . But there is presumption under Section 139 that the cheque produced in the case was drawn by the accused. Referring to various decisions of the Supreme Court and the High Court, it is held in **Kamalammal v. Mohanan** (2006(3) KLT 972 that there is no presumption under Section

139 that the cheque is “drawn” by accused. But, the trial court did not consider whether cheque was drawn by the accused or not. In the absence of consideration of such fact, a presumption could not have been drawn under Section 139. If no presumption arises, there is no question of rebuttal also.

8. A reading of Sections 138 and 139 would show that if drawing of cheque by accused is proved and it is alleged that it was drawn for the discharge of debt or liability and it was received by the complainant and if he is the “holder”, the court shall presume until the contrary is proved that such drawing was for the purpose of discharge of a debt or liability. So, to draw the presumption in respect of purpose for which cheque is drawn, there must be proof that cheque was drawn. The trial court did not probe into the question whether cheque was drawn by accused in the right perspective.

9. The first question which ought to have been considered by trial court is whether all the requisites for drawing presumption under Section 139 existed or not. Only if court is satisfied that such pre-requisites exist, it can draw presumption under Section 139. It is only thereafter that the

court need consider if the presumption is rebutted or not. But, trial court did not consider whether all pre-requisites for drawing of presumption under Section 139 existed or not and whether such presumption arose at all.

10. But the trial court straight away proceeded to consider whether presumption is rebutted. This is clearly illegal. In cases where presumption under Section 139 does not arise there is no burden on the accused to rebut the same. So, the court below erred in holding that the presumption under Section 139 is rebutted even without considering whether all pre-requisites for drawing presumption existed and whether the presumption could be drawn in this case. It was not necessary to consider whether presumption under Section 139 is rebutted, unless and until the court enters a finding that such a presumption can be drawn under Section 139 of the Act.

11. In such circumstances, the entire approach to the issue was improper and illegal. The case deserves a re-look into the relevant issues arising in this case. The trial court shall consider whether all ingredients under Section 138 are proved by prosecution, particularly, the alleged drawing of

cheque by accused which is the main ingredient. Thereafter if the court finds that the presumption under Section 139 can be drawn in favour of the complainant, if he is the "holder" it may draw such presumption. But the presumption shall be drawn only if basis for drawing presumption exist. If the presumption under Section 139 N.I.Act arises, then only the court need to proceed to find out if the accused has rebutted such presumption.

12. The court below held that prosecution failed to establish that Ext.P1 was issued by accused to complainant. If that be so, presumption under Section 139 could not have been drawn. If such presumption does not arise, rebuttal by accused also does not arise. But, the trial court held that accused succeeded in rebutting presumption under Section 139. Thus the entire approach by the trial court to the legal and factual issues in this case was perverse and improper and hence the order under challenge cannot be upheld.

13. The learned counsel appearing for the appellant submits that an opportunity may be given to the appellant to adduce further evidence to prove the execution of the cheque in the light of the view expressed by this Court in this judgment.

It is submitted that in the light of the various precedents, the understanding was that the burden of proving execution of cheque by accused could be discharged with the aid of Section 139. Therefore to meet ends of justice, an opportunity may be given for adducing further evidence, it is submitted. On considering the peculiar facts and circumstances of the case, I find that an opportunity can be given to the appellant.

14. Learned counsel for 1st respondent submitted that the accused is a lady and she is at Bangalore and it may be difficult to procure her presence without delay, on all days due to reasons beyond her control. The case is an old one and hence a direction may be given to trial court to exempt accused from personal appearance, it is submitted. On hearing both sides, I am of the view that the first respondent will be at liberty to bring these facts to the notice of the trial court and if so advised, file a petition for exemption. In such event, the trial court shall consider the same and pass appropriate orders, in accordance with law.

15. In the result:

1. The order of acquittal is set aside.
2. This case is remanded to trial court for fresh

disposal in accordance with law in the light of the observations made in this judgment.

3. The trial court shall give an opportunity to both sides to adduce such evidence as the trial court may deem fit and proper on the relevant aspects in the light of what is observed in this judgment.
4. Both parties shall appear before the trial court on receipt of notice to their counsel.
5. The case being an old one, the trial court shall dispose of the same within three months from the date of receipt of a copy of this judgment.

K. HEMA, JUDGE

K.HEMA, J.

CRL.A.NO.806/2001-C

25th day of July, 2006.

JUDGMENT

//////////However, in the light of the arguments advanced before me, a crucial aspect to be considered is whether the cheque- Ext.P1 was executed or drawn by the accused. There can be no doubt for proving an offence under Section 138 of the N.I.Act but, all the ingredients of Section 138 are to be established. The ingredients of Section 138 are (1) that the cheque is drawn by the accused, (2) that the cheque is drawn on an account maintained by him with a Banker, (3) that the cheque was issued for payment of any amount of money to another person from out of that account (4) that such cheque was drawn for the discharge, in whole or in part, of any debt or other liability, (5) that such cheque is returned by the Bank as unpaid. The reasons for the dishonour are that the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the

amount to be paid from that account by an agreement made with the bank . If these ingredients are established by the prosecution as per Section 138 of the N.I.Act, such a drawal shall be deemed to be committed an offence under Section 138 of the N.I.Act.

7. It is clear from the above pragraph that, the ingredients to be established for proving an offence under Section 138 is that the relevant cheque was drawn by the accused. Drawing of the cheque or execution of the cheque is a most relevant factor to be established in an offence under Section 138. There is no presumption under any of the provisions of the N.I.Act that a cheque can be presumed to be executed or drawn by the accused. I could not come across with any provision under the Act by which the court can presume that the cheque is drawn or executed by the accused. Therefore, the burden is heavily upon the prosecution to establish the crucial aspect.

8. An argument can be raised, on the basis of the decisions reported in **Beena v. Muniyappan** (2001 (3) KLT 950) and the cases following under Section 138, that the court can

presume that the cheque is issued meaning thereby executed by the accused for the discharge of a debt or liability. I have held in (.....) that no presumption is available under Section 139 that the cheque is executed or issued by the accused and that the Supreme Court was emphasizing that the presumption available under Section 138 is in respect of the "purpose" for which the cheque is drawn. What can be presumed under Section 139 of the Act is only the purpose for which the cheque is allegedly drawn but not regarding execution, drawing or issuance of the cheque. There is nothing in Section 139 to show that a presumption is available under the said section in respect of "issuance" (execution) of the cheque. The very expression, issuance or execution, is totally absent in Section 139 and hence, the court cannot import any such expression into the provision, particularly when the provision relates to a legally or compulsorily presumption enabling the court to draw a presumption in favour of the prosecution. The presumption available in Section 138 is only the purpose for which the cheque is drawn. By virtue of the presumption in Section 139, the prosecution will be exempted or exonerated from

the burden of proving one of the ingredients of the offence under Section 138 namely, the purpose for which the cheque is drawn that is for the discharge of a debt or liability. Except to this limited purpose, Section 139 cannot be used for drawing a presumption that the cheque was executed or drawn by the accused.

9. The learned counsel appearing for the appellant vehemently contended that the complainant has established the fact that the cheque is executed by the accused. The complainant has specifically alleged that Ext.P1 cheque was drawn by the accused from the account maintained by her for the discharge of a debt or liability in favour of the complainant. He has also given evidence as PW1 that Ext.P1 is the cheque drawn by the accused and signed by her in his presence. According to the learned counsel appearing for the appellant, this was sufficient to establish the execution of the cheque.

10. In this context, I have to look into the provisions of the Evidence Act as to how a fact is to be proved. A fact can be

proved either by oral or documentary evidence. The oral evidence has to be derived whereas the documentary evidence can be by production of the documents. It can be by production of documents or by adducing secondary evidence. PW1 has given evidence that the complainant has produced the cheque, the document itself, for inspection of the court and also gave evidence that he has seen the accused executed the same in her presence. Therefore, going by the provisions of the Indian Evidence Act namely, Sections 59, 60, 61 and 62, I find that a cheque can be proved by production of the same or by giving oral evidence, which is directed in nature. If a person has executed a document, such a person can be examined to prove the execution. The complainant, PW1, has given evidence that he has seen the accused signing the document. Therefore, it cannot be said that the complaint was not placed before the court for proving or execution of the documents. It cannot be said that the complainant does not discharge the primary burden of proof regarding execution of the documents.

11. The learned counsel appearing for the 1st respondent

vehemently contended that Ext.P1 is not executed by the accused. According to him, Ext.P1 was only a blank cheque handed over to the Dhanam Corporation which in turn was given to the complainant and which was misused against the accused. He has put forwarded a defence case at the instance of the Dhanam Corporation that the accused had open an account with the Bank and that account was opened as introduced by a person from Dhanam Corporation. Only three cheque leaves were given to the accused and such opening of an account was only for the purpose of availing of loan for purchasing a vehicle by hire purchase. To probablise this case, it was brought out in examination of PW2, the Manager, that the account was opened as introduced by somebody from Dhanam Corporation. The accused has also produced Ext.D1, a hire purchase agreement, and also examined DW1 to prove that there was a hire purchase on the strength of hire purchase agreement, Ext.D1. It was also brought out to my notice that there was an endorsement in Ext.D1 that the liability is discharged. In the above circumstances, it is contended that the cheque, Ext.P1, was one which was handed over to the Dhanam Corporation

while executing the hire purchase agreement as a security. The said cheque was misused by the complainant.

12. To prove the connection between the complainant and the Dhanam Corporation and to probablise the case set up by the complainant, PW1, complainant was examined. PW1 was reluctant to admit any connection with anybody else in Dhanam Corporation. The specific suggestion made by PW1 is that he was acquainted with one Jayan of Dhanam Corporation was denied. Several questions were put in this lines, but PW1 denied the same or evaded the questions or gave any correct answers. But the defence was successful in bringing out the fact that the accused, partner in a jewelery shop, is the one of Jayan from Dhanam Corporation. In the light of that admission, an argument was raised that PW1 was deliberately suppressing the facts favourable to the accused and from the conduct of PW1, the court may drawn inference that the case set up by the accused regarding the execution of the cheque, in the circumstances, stated by them is probablised. The documents produced by the defence and the evidence adduced, according to the

accused, will certainly establish the prosecution case or at least a reasonable doubt on the case set up by the prosecution.

13. On going through the evidence of PW1, it is clear that, he has given evidence that Ext.P1 was seen signed by the accused herself. But, the accused denied the fact that she having not executed any cheque in favour of the complainant. However, she admitted the signature in Ext.P1. The contention is that it is a blank cheque. In the light of the defence case, the court has to consider whether the prosecution has proved the execution in the manner in which it is expected. The court has to consider whether the prosecution has discharged the burden by merely examining the complainant himself and state that Ext.P1 was seen signed by the accused in his presence. In this regard, my defence view is that, in any criminal prosecution the burden is under the prosecution to prove it is a case beyond reasonable doubt. A mere assertion or affirmation in evidence may not be sufficient to prove a case beyond reasonable doubt. If the evidence or assertion is put to test

up, the court can examine the same with the worth of evidence and come to the conclusion that whether the prosecution has proved the case beyond reasonable doubt. In my view the offence under Section 138 is not exceptional even in the case of an offence under Section 138. The burden is as heavy as in any other case on the prosecution to prove the case beyond reasonable doubt. The only two presumptions available for the aid or in favour of the complainant could be under Sections 118 and Section 139, both these presumptions can be drawn only if the execution or drawing of the cheque by the accused is proved.

14. When I say the burden is on the prosecution to prove beyond reasonable doubt the offence under Section 138 also, I would examine the nature of the offence committed. It goes without saying that an offence under Section 138 does not constitute a natural crime. It cannot be equated with a murder or a hard or any such offence which is a crime against the society, which is denied under the Indian Penal Code. But the offence under Section 138 is a statute made offence. It is an offence created by a fiction of law. As

Section 138 itself reveals that it is a deemed offence without all the ingredients of the offence under Section 138 are established, the court can presume or deem that an offence is committed. It is not only a natural offence, but it is an offence which the liability permits the court to presume by way of legal fiction. It has also to be borne in mind that until Chapter XVII was brought into the statute book, the acts constituted under Section 138 did not make any offence at all. Therefore, these facts are also to be borne in mind before pronouncing anything upon the burden or by proving the lines on the prosecution in respect of its case.

15. While pronouncing anything on these aspects, the court is bound to bear in mind the object of the provision. The object of the provision, as seen from the statement of object and reasons, would go to show that sufficient safeguards are made in Chapter XVII to prevent harassment against onerous drawee. Therefore, by virtue of Section 118 or 139 it cannot be said that the prosecution has exonerated from the evident of proving the case beyond reasonable doubt. The prosecution can only take the aid of the presumption available

under Section 118 or 139 for proving certain limbs or ingredients of the offence under Section 138. But the burden of proving the entire accused beyond reasonable doubt as a whole in its entirety is heavily on the prosecution. Even by getting the objects and reasons for introducing Chapter XVII and also presumptions available and the nature of the offence as defined in Section 138, I am of the strong view that an offence under Section 138 is of exception which have proved the prosecution case beyond reasonable doubt.

16. Now repeat back to the facts of the case, questioning of the complainant has proved the case beyond reasonable doubt that the complaint was instituted to prosecute an offence under Section 138 of the Act. It is the case of the complainant that a huge amount of Rs.1,47,000/= was borrowed by the accused from him and the accused has failed to pay back the amount. Though the complainant has a remedy under the civil law, he was not satisfied by getting back the amount alone. He approached the criminal court also with a finding that the accused is convicted for offence under Section 138. The complainant can be said to be a

person interested in the success of the prosecution. Though no motive as such can be attributed against the accused, there can be no doubt that the complainant is a person interested in the success of the prosecution. He is a person who is interested in to secure confident against the accused. He is a person who is interested not merely getting back the amount, but to send the accused also to jail. Therefore, while assessing the complaint, the court has to more conscious. The case may be a true case or a false one but the court has to satisfy that the case put forwarded by the complaint is proved beyond reasonable doubt. The execution is a main factor to be established under Section 138. Though the complainant has given evidence that he has seen the accused executing the cheque, PW1 shall subject to cross examination. Several facts have been brought out by the 1st respondent to show the veracity of PW1. The accused has been able to draw some doubt on the veracity of evidence of PW1 to a certain extent, particularly, with respect to acquaintance of Jayan of Dhanam Corporation, who was allegedly helping the complainant to make false complaint against the accused. I am not going into the disputed aspects

of facts , but I am not going to disbelieve PW1 for the time being. The learned counsel appearing for the appellant has strongly argued that principal is not applicable to a witness in India as alleged by the Supreme Court in **Gangadhar Behera v. State of Orissa** (2002(8) JT 135). The question is whether the complainant could be labeled as a liar or not. The question herein is whether the accused is able to discharge the burden beyond reasonable doubt. When the complainant's evidence is put for cross examination and if it is established that the complainant is speaking truth regarding several materials established and that the complainant is also suppressing materials established which would help the court to come to a right conclusion that, it is well settled that, the court in such cases would seek corroboration from independent sources on a particular aspect. On hearing both sides, I find that this is a fit case where the evidence of PW1, being an interested witness, alone can be acted upon safely to enter a conclusion without seeking independent corroboration.

17. The learned counsel appearing for the 1st respondent

strongly contended that the trial court has already come to a finding that the defence version is probablised . This was done based on the evidence adduced in the case. Therefore, in a case of appeal against acquittal this court must be slow to interfere with the finding of facts unless it is perverse. If a reasonable view has been taken by the trial court as per the settled position, it is contended that the court is debarred from interfering with the order of acquittal as laid by the Supreme Court in the decisions reported in **Shailendra Pratap v. State of U.P** (2003 (1) SCC 761), (2001 KLT 506) and **Jai Sham v. State U.T. Chandigarh** **State of West Bengal v. Orilal Jaiswal** (1994 (1) SCC 73). I do not consider the question whether the complainant has established execution of cheque, Ext.P1, as required in the prosecution or not. But the question whether Ext.P1 is a cheque executed by the accused or not has not been decided by the trial court as per the judgments under challenge. The court has not considered the question at all, on the other hand considered the transaction like advancing the amount to the accused was believable or not. There is a lot of difference in saying whether execution of the cheque is proved or whether the

amount is advanced by the complainant to the accused or not. Since the court below has failed to consider the question of execution of cheque by the accused, the subsequent question whether the presumption under Section 139 is rebutted or not does not arise. Therefore, in the absence of specific finding on the relevant question regarding execution of the cheque, in my view, the court ought not have considered whether there was an evidence of rebuttal.

19. It is needless to say that the provision of presumption comes only after the ingredients or the requirements under the relevant provisions are satisfied. To draw a presumption under Section 118 or under Section 139, the court has to be satisfied that the cheque was drawn by the accused. It will be clear from Section 139 that to draw a presumption, the court must be satisfied that the cheque is of the nature stated in Section 138. Therefore, unless and until the court examines the question whether the cheque is of the nature stated in Section 138 or whether it was drawn by the accused, there is no question of drawing of any presumption under Section 139. The court has considered the question of rebuttal even before the question came up for consideration.

The presumption can be raised only if the requirements under Section 139 are satisfied. One of the requirements for raising a presumption under Section 139 is that the cheque is of the nature referred to in Section 138. Evidently a cheque to be of the nature stated in Section 138, it must be established by the complainant that the cheque is drawn by the accused. The presumption under Section 139 is considered in favour of the complainant. The whole complaint was revealed from the title itself. If the benefit of the presumption is to be availed by the complainant, the burden is on the complainant to establish the basis for drawing the presumption. Therefore, in a case where even execution has not been drawn beyond reasonable doubt by the available evidence, it will be meaningless to say that the accused is rebutted the presumption. The presumption does not arise and the question of rebuttal also does not arise. The learned counsel appearing for the 1st respondent submitted that the 1st respondent is a lady and she is not in station for appearance on all posting dates before the court below. It is also submitted that the case being an old one, it is difficult to procure the presence, since she has already shifted her residence in Bangalore. Taking the

peculiar circumstance in which the accused is placed, I direct the trial court to exempt the 1st respondent from personal appearance. It is not possible for this Court to give any such direction because it is revealed from the discussion of the court below that to grant exemption or not is depending upon the facts and circumstances of the case. The first respondent will bring the facts to the court and file an application for exemption, if so advised. In which event, the trial court will consider the matter and dispose of the application in accordance with law.

20. The learned counsel appearing for the appellant submits that an opportunity may be given to the appellant to adduce further evidence to prove the execution in the light of the view expressed by this Court in this judgment. It is submitted that the appellant was under the impression that the burden was discharged by examining the accused and also by seeking aid of Section 139 presumption. Therefore, it is only just and proper that an opportunity is given for adducing further evidence,. In the peculiar facts and circumstances of the case, I find that an opportunity can be given to the appellant. The order of acquittal is set aside.

The lower court is directed to take the case on trial and give the appellant to adduce evidence to establish the execution of the cheque, in which event, the 1st respondent/ accused be given such an opportunity to adduce evidence as the court may deem fit and proper. Both the parties shall appear before the court on 28.8.2006. The case being an old one, the court below shall dispose of the case within two months from the date of receipt of a copy of this judgment.

K.HEMA,JUDGE

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